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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

TODD M. HONEYCUTT,

Petitioner,

vs.

BILL DONAT, *et al.*,

Respondents.

2:06-cv-00634-RLH-GWF

ORDER

This habeas matter comes before the Court on respondents' motion (#71) to reconsider order, which timely seeks amendment of the prior order and judgment (## 69 & 70) conditionally granting a writ of habeas corpus. The issue presented concerns the proper scope of the remedy on remand following upon a decision by the Court of Appeals affirming in part and reversing in part the prior denial of federal habeas relief.

Background

Petitioner Todd Honeycutt challenges his 1999 Nevada state conviction, pursuant to a jury verdict, of: (a) one count of first-degree kidnapping and two counts of sexual assault in No. C151952 (the "sexual assault case"); and (b) one count of solicitation of murder in No. C156839 (the "solicitation case").

Honeycutt initially was charged in the sexual assault case with the May 16, 1998, first-degree kidnapping and sexual assault of Karen Bates. The first trial ended in a mistrial due to a hung jury.

Prior to the retrial in the sexual assault case, Honeycutt was charged in the solicitation case with allegedly having sought in November and December 1998 to have Bates murdered.

1 The cases were joined for trial on the State's motion and over a defense objection.

2 At the hearing on the motion for joinder, the State argued, *inter alia*, as follows in
3 support of joinder of the cases for trial:

4 These two cases, it is absolutely compelling how
5 interrelated they are. Any argument that they are not interrelated
6 is quite frankly, just [specious]. I mean, if you look at it, you have
7 this defendant on, in May of 1998 . . . sexually assaulting and
8 kidnaping this victim and . . . from that day on he has engaged in
9 a continuous course of conduct with this victim . . . [W]hat we
10 have was . . . the sexual assault and the kidnaping and then when
11 he was taken into custody we had phone calls to the victim on the
12 eve of the preliminary hearing to intimidate, we had letters to the
13 victim during the process, ultimately leading up until after the first
14 trial with the hung jury and the defendant actually soliciting the
15 murder of the sexual assault victim, hoping that that would take
16 care [of it] and cause his sexual assault case to be dismissed.

17 There is no way you can try the solicitation for murder case
18 without going into the facts of the sexual assault and kidnaping
19 case. I mean, that . . . clearly goes to the motive and intent as to
20 why he wanted this woman murdered, is because she reported
21 him and went through the criminal justice process against him as
22 a defendant in a rape case. So the two case[s] are very much
23 interrelated.

24 Additionally, the solicitation for murder evidence is cross
25 admissible as evidence of consciousness of guilt and the case
26 law also supports that. In *Abram vs. State* . . . the court held that
27 it is sometimes relevant to show that an accused has threatened
28 a witness with violence. The court further ruled that declarations
made after the commission of the crime which indicate
consciousness of guilt or are inconsistent with innocence or tend
to establish intent may be admissible. And in *Reese v. State* . . .
the court ruled that the conduct of an accused which show[s]
consciousness of guilt is admissible even though it may in itself
be criminal. I would submit to you judge that this defendant hiring
another inmate to murder the victim in this case absolutely shows
consciousness of guilt as to his sexual assault and kidnap case.

29 #20, Ex. 24, at 2-3.

30 At the joint trial, the State introduced testimony by a jailhouse informant and an
31 undercover officer that petitioner allegedly solicited them to murder the victim. The State
32 introduce this testimony, *inter alia*, to establish consciousness of guilt on the sexual assault
33 case – *i.e.*, as inculpatory evidence as to a case where he had been represented by counsel
34 at the time of the statements. Evidence of guilt on the sexual assault case – including this
35 evidence of alleged consciousness of guilt – in turn was used to establish motive in the

1 solicitation case. No limiting instruction was given restricting this dual use of the evidence.
2 Indeed, such dual use was the *raison d'être* for the joinder of the cases. See, e.g., #75, Att.
3 A, at 5-7; *id.*, Att. B, at 1 & 3-8; *id.*, Att. C, at 2-7 (representations by the parties in this regard
4 on the federal appeal in the Ninth Circuit).

5 Honeycutt was convicted of all charges in both cases in the joint trial.

6 On direct appeal, petitioner raised a number of grounds, including: (a) constitutional
7 claims challenging the joinder of the cases; and (b) constitutional claims challenging the
8 introduction of certain statements that he allegedly made to the jailhouse informant and
9 undercover detective.

10 The state supreme court rejected all claims of error. The court rejected Honeycutt's
11 challenge to the joinder of the cases in part due to the cross-admissibility of the evidence in
12 one case also in the other. The court stated: "In this case, in a trial of the solicitation to
13 commit murder charge, the sexual assault and kidnapping would be admissible to establish
14 motive, and in a trial of the sexual assault and kidnapping charges, the solicitation to commit
15 murder would be admissible to show consciousness of guilt." *Honeycutt v. State*, 118 Nev.
16 660, 668, 56 P.3d 362, 367 (2002). The court rejected a number of claims, including the
17 claims challenging the admission of certain jailhouse statements, summarily in a footnote.

18 Subsequently, on federal habeas review, petitioner presented a number of grounds,
19 including claims challenging the joinder and the admission of certain jailhouse statements.
20 This Court denied relief on all grounds.

21 The Ninth Circuit affirmed on all grounds except the ground challenging admission of
22 certain jailhouse statements under *Massiah v. United States*, 377 U.S. 201 (1964).

23 In affirming the Court's rejection of the joinder claim, the Ninth Circuit noted, *inter alia*,
24 that the "[e]vidence of the sexual assault and kidnapping was cross-admissible with the
25 evidence of solicitation." #58, at 6.

26 The Court of Appeals held as follows regarding the *Massiah* claim:

27 The Nevada Supreme Court unreasonably denied
28 Honeycutt's *Massiah v. United States*, 377 U.S. 201 (1964),
claim. The Sixth Amendment did not bar the State's investigation

of the solicitation charge, even though Honeycutt was previously charged with the related offenses of sexual assault and kidnapping. See *McNeil v. Wisconsin*, 501 U.S. 171, 175–76 (1991) (“The police have an interest . . . in investigating new or additional crimes [after an individual is formally charged with one crime.]” (alterations in original) (quoting *Maine v. Moulton*, 474 U.S. 159, 179 (1985))). Nor did it bar the government from using Honeycutt’s deliberately elicited statements as evidence of guilt on the solicitation charge.

But the Sixth Amendment did forbid the government from using deliberately elicited statements to incriminate the defendant on charges to which the right of counsel had already attached. See *Moulton*, 474 U.S. at 180. Applying this rule, we conclude that this case is indistinguishable from *Moulton*. Here, as in *Moulton*, the state elicited incriminating statements through an informant (and undercover agent) while the defendant was under indictment. See *id.* at 177 (the state “knew that [the defendant] would make statements that he had a constitutional right not to make to their agent prior to consulting with counsel”). Here, as in *Moulton*, the incriminating statements led to a new charge being filed against Honeycutt. Here, as in *Moulton*, the state used Honeycutt’s deliberately elicited statements to incriminate him on charges to which his right of counsel had already attached.

We do not reach the issue of whether the violation of Honeycutt’s *Massiah* right was harmless error. “Usually when the government fails to argue harmlessness, we deem the issue waived and do not consider the harmlessness of any errors we find.” *U.S. v. Gonzalez-Flores*, 418 F.3d 1093, 1100 (9th Cir. 2005) (“This makes perfect sense in light of the nature of the harmless-error inquiry: it is the government’s burden to establish harmlessness, and it cannot expect us to shoulder that burden for it.”). None of the exceptions to the harmless-error waiver rule applies here. See *id.* at 1100–01.

#58, at 7-9.

The disposition on the appeal stated simply: “AFFIRMED IN PART AND REVERSED IN PART.” #58, at 9.

Discussion

The question at this juncture is what remedy is appropriate following the Ninth Circuit’s holding that the state supreme court unreasonably rejected petitioner’s *Massiah* claim in a circumstance where the sexual assault case was joined for trial with the solicitation case. The issue in particular is whether a retrial should be ordered on both cases where the evidence in question properly would have been admissible in the solicitation case had it been tried standing alone -- which it of course in fact was not because the cases were tried together.

1 Federal courts have broad discretion in fashioning appropriate habeas relief:

2 In habeas cases, federal courts have broad discretion in
 3 conditioning a judgment granting relief. *Hilton v. Braunskill*, 481
 4 U.S. 770, 775, 107 S.Ct. 2113, 95 L.Ed.2d 724 (1987). “Federal
 5 courts are authorized, under 28 U.S.C. § 2243, to dispose of
 6 habeas corpus matters as law and justice require.” *Id.* (internal
 7 quotations omitted). More specifically, a court may issue a
 8 conditional writ that requires the state to release a petitioner
 9 unless it takes some other remedial action, such as retrial of the
 10 petitioner. *Herrera v. Collins*, 506 U.S. 390, 403, 113 S.Ct. 853,
 11 122 L.Ed.2d 203 (1993); *Braunskill*, 481 U.S. at 775, 107 S.Ct.
 12 2113 (“[F]ederal courts may delay the release of a successful
 13 habeas petitioner in order to provide the State an opportunity to
 14 correct the constitutional violation found by the court.”). The
 15 United States Supreme Court recently provided guidance on
 16 crafting a habeas remedy. In a case concerning a Sixth
 17 Amendment violation, the Court stated:

18 [R]emedies should be ‘tailored to the injury
 19 suffered from the constitutional violation and should
 20 not unnecessarily infringe on competing interests.’
 21 Thus, a remedy must ‘neutralize the taint’ of a
 22 constitutional violation, while at the same time not
 23 grant a windfall to the defendant or needlessly
 24 squander the considerable resources the State
 25 properly invested in the criminal prosecution.

26 *Lafler v. Cooper*, — U.S. —, 132 S.Ct. 1376, 1388–89, 182
 27 L.Ed.2d 398 (2012) (quoting *United States v. Morrison*, 449 U.S.
 28 361, 364–65, 101 S.Ct. 665, 66 L.Ed.2d 564 (1981)). . . .

29 *Lujan v. Garcia*, 734 F.3d 917, 933-34 (9th Cir. 2013).

30 In the present case, the State elected to try the cases together, relying upon the
 31 evidence introduced to obtain a conviction on the sexual assault case also to establish motive
 32 in the solicitation case. While the evidence in both cases was fairly strong, each case
 33 nonetheless turned to a not insignificant degree on credibility. That point is to an extent
 34 reflected in the fact that the first trial of the sexual assault case ended in a hung jury.

35 The Court thus now is presented with a situation where, under the Ninth Circuit’s
 36 decision, evidence in the sexual assault case – which in turn was used also to establish
 37 motive in the solicitation case – was introduced in violation of the Sixth Amendment.

38 Given that the rule of *Massiah* is offense specific, the State could have presented the
 39 same evidence in a separate trial solely on the solicitation case without violating the Sixth
 40 Amendment. But it did not. The State instead presented the evidence in a joint trial where

1 the evidence of the alleged solicitation effort was used to establish guilt on the sexual assault
2 case – which in turn was used to establish motive in the solicitation case. In the manner in
3 which the case was tried by the State, the conviction in the solicitation case thus also
4 ultimately is grounded upon evidence introduced in violation of the Sixth Amendment. While
5 the State seeks to neatly parse between the effect of the error as if the cases were tried
6 separately, the cases were not tried separately.

7 The State elected to pursue the two cases in a manner in which the convictions could
8 stand – and perhaps also fall – together. If the jury, unlike at the first trial, found for the State
9 on the sexual assault case, it would be more likely as a practical matter that the jury also
10 would find for the State in the solicitation case. At the second trial, that determination in the
11 sexual assault case was made by the jury based upon evidence admitted in violation of the
12 Sixth Amendment. Conditioning a grant of the writ on a retrial instead only on the sexual
13 assault case would give the State, not the petitioner, the benefit of a windfall. Such a limited
14 remedy would uphold a result obtained through a joint trial where the convictions on *both* the
15 sexual assault and solicitation cases ultimately trace back – through cross-admissibility – to
16 evidence admitted in violation of the Sixth Amendment in the joint trial. While such a violation
17 would not have occurred as to the solicitation case on similar evidence if the solicitation case
18 had been tried separately, that, again, is not what the State did here. Particularly following
19 the Ninth Circuit’s holding that any harmless error argument is waived herein, which now is
20 law of the case, the State simply will have to lie in a bed of its own making as to the effect of
21 the Sixth Amendment violation on both of the cases in the joint trial.

22 Respondents’ motion therefore will be denied with regard to the primary relief sought.¹
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24
25 ¹The Court is not persuaded that the Ninth Circuit affirmed as to the conviction in the solicitation case
26 and reversed only as to the conviction in the sexual assault case. Nothing in the final disposition made such
27 a specification. Rather, it appears that the disposition refers to the Ninth Circuit having reversed the rejection
28 of the *Massiah* ground and affirmed the rejection of all remaining grounds. The issue here is remedy. The
statement in the Court of Appeals memorandum that the Sixth Amendment “did not bar the government from
using Honeycutt’s deliberately elicited statements as evidence of guilt on the solicitation charge,” standing
alone, does not itself speak to the proper remedy for the erroneous admission of the evidence as evidence of
guilt on the sexual assault case where the cases were tried jointly.

1 The Court will, however, modify the judgment to allow respondents an opportunity to
 2 obtain review of the decision herein through to an initial panel decision on the issue in the
 3 Court of Appeals. The Court will reset the time for the State to file an election as to whether
 4 to retry petitioner to 60 days from, *inter alia*, such an initial panel decision. Thereafter,
 5 however, respondents must seek any further stay of relief, including of the election deadline,
 6 from a reviewing court pending any requests for panel rehearing, *en banc* rehearing, and/or
 7 *certiorari* review. This Court will not delay proceeding forward with the conditional grant of
 8 relief past the point where the Court of Appeals either has addressed the issue in an initial
 9 panel decision or has definitively declined to consider the issue at that level.²

10 The Court is not persuaded that it would be proper for it to place any restriction, as
 11 requested by petitioner, on whether the cases again can be tried jointly. The Ninth Circuit
 12 upheld the state supreme court's rejection of a challenge to the joinder of the cases *per se*.
 13 Of course, in any joint retrial, the Ninth Circuit's *Massiah* holding essentially would be law of
 14 the case.

15 This Court's prior order (#69) was intentionally indefinite in this regard, stating only that
 16 "a" retrial must commence within 120 days of the State's election to retry. In amending the
 17 prior order, the Court will specify that, if the matters are severed by the state court, the first
 18 retrial will be timely in this regard if commenced within 120 days of the election and the
 19 second retrial will be timely if commenced within 60 days of a conclusive verdict in the retrial
 20 of the first case. The disposition of any request for relief as to joinder or severance is a
 21 matter to be determined by the state court with regard to retrial of the currently joined cases.

22 IT THEREFORE IS ORDERED that respondents' motion (#71) to reconsider order is
 23 GRANTED IN PART and DENIED IN PART as per the remaining provisions of this order.

24 IT FURTHER IS ORDERED that the Clerk of Court shall enter an amended judgment
 25 that repeats the immediately following paragraph verbatim in the amended judgment.

26
 27 ²If respondents pursue multiple avenues of review -- such as both a proceeding seeking to enforce
 28 the mandate and an appeal from this order and the amended judgment -- respondents should advise the
 Court of Appeals in each proceeding of the multiple avenues being pursued.

1 IT IS ORDERED that a writ of habeas corpus is conditionally GRANTED such that the
2 state court judgment of conviction filed on December 8, 1999, in Nos. C151952 and C156839
3 in the Eighth Judicial District Court, State of Nevada, hereby is VACATED and that within sixty
4 (60) days of entry of judgment, or, if review is sought in the Court of Appeals, from the initial
5 panel decision either addressing the challenge to the Court's order and judgment or
6 definitively declining to consider the challenge, petitioner Todd Michael Honeycutt, Inmate No.
7 63545, shall be released from custody unless respondents within that time file in this matter
8 a written notice of election to retry petitioner and the State thereafter commences jury
9 selection in a retrial within one hundred twenty (120) days following the filing of the notice of
10 election to retry petitioner, subject to request for reasonable modification of the time periods
11 in the judgment by petitioner and/or respondents pursuant to Rules 59 or 60. If the joined
12 cases against petitioner are severed by the state court, retrials will be timely for purposes of
13 the judgment herein if the retrial on one of the severed cases commences within one hundred
14 twenty (120) days of the election to retry and a retrial on the remaining case commences
15 within sixty (60) days of a conclusive verdict in the first case retried.

16 The Clerk further shall SEND a copy of this order and the amended judgment to the
17 Clerk of the Eighth Judicial District Court, in connection with that court's Nos. C151952 and
18 C156839.

19 DATED: May 12, 2014.

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22 ROGER L. HUNT
23 United States District Judge
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